In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-502

ESTATE OF HARRY FRIED, DECEASED,
ETHEL FRIED, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A2–A43) is reported at 54 T.C. 805. The opinion of the court of appeals (Pet. App. A46–A56) is reported at 445 F.2d 879.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1971 (Pet. App. A46). The petition for a writ of certiorari was filed on October 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2056(b) of the Internal Revenue Code of 1954, which disallows the marital deduction for bequests to the surviving spouse which are

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conditioned on the lapse of time or the occurrence of an event, unconstitutionally discriminates against persons in common law states.

2. Whether both courts below correctly applied state law in construing decedent's will to condition the bequest to his widow on her surviving until the will was probated.

STATUTES INVOLVED

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

Decedent's will provided that all of his estate would go to his wife if she survived him. If she did not survive him, or died in a common disaster with him, "or in the event that my * * * beloved wife survives me but dies before the probate of this my Last Will and Testament," the net estate was to go to his daughter. (Pet. App. A5.)

Decedent, a resident of New York, died in July, 1963. His estate claimed the estate tax "marital deduction," allowed by Section 2056 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 7–8), for the property bequeathed to the widow. This statute allows a deduction, in an amount not to exceed one-half of the adjusted gross estate, for the value of property passing to a surviving spouse. However, so-called "terminable interests" do not qualify for the marital deduction. These are interests which are not certain to vest in the surviving spouse, but will terminate or fail, and pass to another person, by reason of the lapse of

time, or the occurrence or nonoccurrence of an event or contingency. Excepted from the "terminable interest" rule, and therefore deductible, are interests which may terminate or fail (1) on the deaths of the decedent and spouse in a common disaster, or (2) within a period not exceeding six months from the date of the decedent's death (Section 2056(b)(3)).

The Commissioner disallowed the deduction claimed on the ground that the requirement in the will that the widow survive until probate might delay her taking the bequest beyond the six-month period permitted by the statute, since, under New York law, probate of a will may take more than six months. The Tax Court sustained the Commissioner's determination that the widow's interest was terminable. It rejected petitioner's contention that the language of the will be construed to provide that the requirement of survival until probate was applicable only in the event of a common disaster. (Pet. App. A18–A32.) The court of appeals affirmed, agreeing that this requirement was separable from the common disaster clause, and, therefore, that the bequest to the widow did not come within the common disaster exception to the terminable interest rule (Pet. App. A50–A53).

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. As this Court has explained, the predecessor of Section 2056 of the Code was enacted in 1948 "to equalize the incidence of the estate tax in community property and common-law jurisdictions" by allowing

"transfer of up to one-half of noncommunity property to the surviving spouse free of the estate tax." *Pennsylvania National Bank* v. *United States,* 387 U.S. 213, 219; see also *Jackson* v. *United States,* 376 U.S. 503. In a community property state, one-half of the community property is not included in the decedent's gross estate, since, under state law, the surviving spouse is deemed to own outright one-half of the community.

Petitioner contends for the first time in this Court (Pet. 4–7) that Section 2056 unconstitutionally discriminates against persons in common law jurisdictions (Pet. 4–7). The nub of this contention is that while the deductibility of marital interests in such jurisdictions is subject to the terminable interest rule, no similar rule applies in community property states. There, as petitioner views the matter, it is sufficient if a spouse in fact survives the decedent and takes one-half or more of the estate.

There is no merit to this contention. Any difference in the incidence of estate taxation in community property and common law jurisdictions is attributable now, as it was before 1948, not to the federal tax law, but to the differing laws of these jurisdictions. See *Fernandez* v. *Wiener,* 326 U.S. 340, 358–359. In any event, the one-half interest of the community property state surviving spouse is not a terminable interest, but rather constitutes an outright ownership interest. This Court so held long ago, and reaffirmed this holding only last term. See *Poe* v. *Seaborn,* 282 U.S. 101; *United States* v. *Mitchell,* 403 U.S. 190. Finally,

it should be noted that to the extent that the property of a community property state decedent is separate property, it may qualify for the marital deduction only if the terminable interest rule of Section 2056 is satisfied.

Petitioner also claims that Congress has a constitutional duty to equalize precisely the impact of the estate tax in community property and common law jurisdictions. But this Court has repeatedly held, most recently last year, that "a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6.

Here, it is clear that Congress had ample reason for providing that terminable interests do not qualify for the marital deduction—to assure that property interests deducted from the deceased spouse's estate would not also escape taxation in the estate of the surviving spouse. The common disaster and six-month exceptions to the terminable interest rule were designed to ameliorate the possible harsh results of that rule. See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 7–8. It was plainly within Congress' prerogatives to fashion detailed rules and exceptions in order to achieve general uniformity in estate taxation in community property and common law states, and, at the same time, protect the revenues.

2. Petitioner mistakenly asserts a conflict in approach between this Court's decisions in *Pennsylvania National Bank, supra,* and *Jackson* v. *United States,*

supra (Pet. 7–8). These cases raise issues different from one another and from that raised here. There is likewise no conflict with the courts of appeals' decisions cited by petitioner (Pet. 8–9). Each of them turns on the language of the particular wills involved and the local law, and is fully consistent with the decision below in applying the terminable interest rule.

3. The lower courts correctly applied New York law in construing decedent's will. Their conclusion, that the requirement in the will that the widow survive until probate was separate from the common disaster clause, is the only conclusion compatible with the unequivocal language of the will. The critical testamentary language in *In re Bull's Estate,* 175 Misc. 197, 23 N.Y.S. 2d 5 (Surr. Ct.), upon which petitioner places major reliance (Pet. 11–12), is, on its face, significantly different. See Pet. App. A21–25; A51–A52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

* * * * *

(b) *Limitation in the case of life estate or other terminable interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(3) *Interest of spouse conditional on survival for limited period.*—For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

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